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No. 04-1485

In The Supreme Court of the United States

WHITE-RODGERS,
A DIVISION OF EMERSON ELECTRIC COMPANY,

Petitioner,

v.

FRED D. BITLER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is it necessarily abuse of discretion for a Federal Judge to allow distinguished experts to provide reasonable and reliable testimony, in accord with their skills, training and experience, as to the existence of a generally accepted defect in a propane gas hot water heater control, without conducting unhelpful testing of component parts altered by an explosion and subsequent events?

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RESPONDENTS FRED D. BITLER AND PEGGY L. BITLER'S BRIEF IN OPPOSITION TO WHITE-RODGERS' PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

This case, properly decided unanimously by more than a dozen federal judges, in at least six separate stages, is a fact-bound case that doesn't involve a significant issue of federal law or a circuit split. In addition to its rampant hyperbole, Petitioner's brief generally mischaracterizes the expert testimony presented at trial in this matter. Respondents take issue with this wholesale mischaracterization as more fully discussed below. Petitioner and Respondents disagree on nearly every important issue concerning the skills, training, experience and investigations of Respondents' experts. To date, all such issues have been resolved in Respondents' favor. Petitioner now asks this Court to intervene and hold that the jury and more than a dozen federal judges to review this case each erred.

Fred and Peggy Bitler resided in a house on the Oldland Ranch outside of Meeker, Colorado, where Fred Bitler was employed as a ranch hand. (Pet. App. 3a) On the evening of July 25, 1996, Mr. Bitler discovered that there was no hot water when he attempted to shower. (*Id.*) The Bitlers' hot water was supplied by a liquid propane hot water heater located in the basement. (*Id.*) Mr. Bitler proceeded to the basement, and when he had walked approximately two-thirds of the way down the staircase, he was hit by the force of a large explosion from the basement. (*Id.*) Mr. Bitler's wife, Peggy Bitler, who was upstairs, was thrown off of a sofa onto the floor which was later determined to have been raised several inches by the force of the explosion from below. (*Id.*) Mr. Bitler sustained

severe injuries including extensive burns (requiring multiple painful surgeries), general disfigurement, and inability to regulate his body temperature, that rendered him unable to work as a cowboy and ranch hand. (*Id.*)

Petitioner, White-Rodgers, a subdivision of Emerson Electric Company, manufactured the subject gas control on the Bitlers' hot water heater. (Pet. App. 4a) The gas control is intended to regulate the flow of LP gas to the pilot and main burner of the home water heater, and it is intended to stop the flow of gas if the pilot light is extinguished. (*Id.*) It is well established and known that copper sulfide particles may become lodged on the safety valve seat in Petitioner's gas controls, preventing the valve from sealing and causing a propane gas leak. (*Id.*) This precise problem has led to several leaks and explosions. In 1978, at the behest of the Consumer Product Safety Commission, White-Rodgers attempted to modify the design of its safety valve. (*Id.*) Despite these attempts, the problems of copper sulphide contamination persisted.

Prior to trial, the Bitlers hired several experts to testify on their behalf. The background, experience and education of these experts and the substance of their testimony, is detailed below. Contrary to Petitioners assertion, Respondents have never suggested, nor have their experts suggested, that there existed "one particle" of copper sulfide that lodged open the safety valve. Rather, the evidence at trial demonstrated that copper sulfide particles of all sizes combined with excess grease on the subject safety valve to form a paste that held the valve open. At trial, the Bitlers established that copper sulfide contamination existed on the safety valve seat of the subject valve before, during, and after the subject explosion. Respondents proved the existence of copper sulfide

contamination on the safety valve seat through the testimony of experts who saw the contamination with their own eyes after opening the valve; and from photographic evidence (SEM and EDAX) that confirmed the existence of copper sulfide contamination on the safety valve seat. Numerous photographs of copper sulfide contamination located downstream of the screen in the subject valve were admitted into evidence. (*See, e.g.*, Aplee. Supp. App. at 156-157) Respondents provided expert testimony that the copper sulfide contamination could and did lodge open the safety valve seat sufficient to cause the leak in question, which resulted in the explosion. Respondents provided documentary evidence of copper sulfide contamination and expert testimony from several experts displaying precisely how the subject explosion occurred.

Petitioner wrongly contends that, "[T]here is no evidence that any of the tiny particles found inside the control were large enough to have prevented the safety valve from shutting properly when the pilot light extinguished." (Pet., p. 5) Respondents' expert Donald Sommer, measured one of the pieces of copper sulfide and testified that it was 85 micrometers in size. (Aplt. App. at 1335) Allan Bullerdiek, another of Respondents' experts, testified that a sulfide particle as small as a human hair (70 micrometers) can lodge the safety valve seat open enough to cause a gas leak sufficient to cause the explosion. (Aplt. App. at 2497) The Court and the jury relied on photographs, measurements, physical observation and expert testimony. There was ample physical evidence supported by expert testimony that had been subjected to a gatekeeping function at the trial court. Close examination of the Petition for a writ of certiorari betrays Petitioner's continuing quest to reargue the facts.

Respondents theory, largely ignored in the Petition, was that particulate contamination (copper sulfide) mixed with grease on the safety valve seat, and lodged open the valve. (Aplt. App. at 1251) Grease and particulate contamination were located on, around, upstream and downstream of the safety valve, all of which was well documented by photos admitted into evidence (Aplt. App. at 1220, Aplee. Supp. App. at 159).

District Judge Nottingham noted that there was testimony of observed debris downstream of the inlet screen. (Aplt. App. at 266) Judge Nottingham also noted that Mr. Sommer conducted research and offered testimony as to the inadequacy of the screen. (Aplt. App. at 267) Voluminous evidence was admitted at trial concerning the general acceptance that gas control safety valves may become inoperable and dangerous when subject to sulfide particulate contamination, and may cause an explosion. (Aplt. App. at 267) In an effort to keep the evidence from the jury, Petitioner offered at trial to stipulate that sulfide particulate contamination has caused intermittent valve leaks, precisely what Petitioner now refers to before this Court as "junk science" (Aplt. App. at 1910).

Petitioner's contention that there was no basis for Respondents' experts' conclusion that copper sulfides and other contaminants passed through the sides of the screen causing the explosion ignores several relevant and crucial facts established at trial. Petitioner acknowledges that explosions are a known cause of sulfide particles cracking, breaking and falling off safety valve seats. (Aplt. App. at 1286) Petitioner ignores that in addition to other contaminants found on the safety valve seat, an inordinate amount of lubrication (grease) was found on the safety

valve seat itself. (Aplt. App. at 1251) As the evidence established at trial, the presence of grease betrayed a manufacturing defect since this lubricant was not supposed to be placed on the safety valve seat. (Aplt. App. at 1243)

Because there is no circuit split, and because Petitioner has mischaracterized the nature and character of Respondents' expert testimony at trial, Respondents are compelled to set forth each of their experts, their skills, training and experience, and the substance of their testimony.

Expert Testimony

A. Eldon Boh

Mr. Boh graduated from high school in 1964, and obtained an Associates Degree in Fire Science Technology. He received training through the Denver Fire Department Southern Bureau. In addition, he attended fire training programs across the country at institutions including Northwestern University and Rutgers University, and he attended several classes through the National Fire Protection Association. He served in the United States Navy from 1964 to 1969. Mr. Boh joined the Englewood Fire Department in April of 1969.

By the time of the subject explosion, Mr. Boh had spent 25 years applying fire science technologies, and was a member of the National Fire and Fraud Investigators Association, the International Association of Arson Investigators, and the founder of the Colorado International Association of Arson Investigators. In 25 years as an

investigator, Mr. Boh has investigated approximately 2500 fires, including the MGM Grand Hotel fire in Las Vegas, the Stapleton Tank Farm explosion, the Crested Butte State Bank explosion, the University Hills Shopping Center fire and the Citadel Shopping Center fire in Colorado Springs.

Mr. Boh was hired by Colorado Farm Bureau, the insurer of the ranch property, to do a cause and origin investigation into the fire and explosion that occurred at the Oldland Ranch. Mr. Boh has expressed his opinion to a reasonable degree of scientific certainty that the White-Rodgers gas control failed, causing the explosion. Mr. Boh eliminated all sources of gas except the water heater. The nature of the explosion suggested that it originated from the hot water heater and, most likely, the gas control. Mr. Boh followed the most commonly followed procedure, eliminating other ignition sources and working from lesser areas of damage to areas with greater damage in order to determine cause and origin.

B. Donald Sommer

Mr. Sommer is a graduate engineer with a degree from the University of Michigan College of Engineering, and owner of Aeroscope, Inc. Aeroscope deals in engineering analysis relating primarily to accidents and mishaps. Mr. Sommer graduated from high school in 1964 and entered the Albion College School of Math and Sciences. He attended Albion College for two years before moving to the University of Michigan College of Engineering, where he completed three additional years. Mr. Sommer's graduate work dealt with testing instrumentation systems and cryogenics, studying low temperature gasses and working

on research projects for NASA. As an engineering student, he studied physics, math, sciences, fluid dynamics, thermodynamics, stress analysis, materials analysis, engineering testing, engineering report writing, and graduate mechanical engineering. In his advanced coursework, Mr. Sommer studied engineering, physics and advanced sciences related to failure analysis.

In addition to being an engineer, Mr. Sommer is an aircraft accident investigator and professional pilot. He is also an airframe and power plant mechanic. Prior to testifying in this case, Mr. Sommer investigated a number of other explosions and fires. Most notably, Mr. Sommer worked on the team that investigated the fire and explosion that occurred on TWA Flight 800 off Long Island, New York. In addition, he investigated several LP gas explosions.

Mr. Sommer brought his education, training and experience to the investigation of this explosion. Mr. Sommer examined all potential causes of the subject explosion. Mr. Sommer and his staff looked at reports and analyses done by others in this case, examined the Bitlers' residence on two occasions, took various pieces of equipment involved in the gas system of the house and analyzed those pieces of equipment to determine if there was a defect present that was related to the explosion in the Bitlers' house. Mr. Sommer testified that it was obvious that the injuries to Mr. Bitler and the damage to the Bitler residence were caused by a propane gas explosion in the lower level of the house.

Mr. Sommer reviewed investigative reports by the Fire District, the Meeker Volunteer Fire Department and the Sheriff's Department. Mr. Sommer reviewed a significant

number of photographs relating to the case and took several photographs himself. Mr. Sommer testified that the explosion created a hard concussive action that broke a door, a door handle, blew the window out of the door, left the upstairs living room in extreme disarray with chairs knocked over, and the floor of the living room lifted up exposing the floor joists beneath.

Mr. Sommer classified the subject explosion as an extremely concussive, powerful and destructive explosion. Mr. Sommer testified that the concussive force in the basement was sufficient to break the studding of the wall and actually move the drywall several feet away from the wall. Mr. Sommer testified that various objects were blown from the basement into the stairwell. After receiving a number of pieces of hardware taken from the Bitlers' hot water heater, Mr. Sommer scheduled a teardown inspection of those pieces. Petitioner had a representative present at this inspection. The parties agreed as to a single protocol for the inspection. When the parties dissembled the gas control, the covering gasket was removed and the inlet screen was left in place in its chamber in the control valve. Mr. Sommer testified at trial that there was significant debris located on both sides of the inlet screen. Mr. Sommer measured the dimensions of the channel in which the screen fit and measured it to be .13 or .14 inches in diameter; however, the screen is made of 1/64-inch steel. Mr. Sommer measured the screen and analyzed it for conformity with engineering drawings. Mr. Sommer concluded that the measurements of the screen did not comply with the engineering drawings. The screen was not long enough to meet the specifications of the drawings. The height of the subject screen was actually .0042 of an inch larger than called for in the engineering drawings.

The most significant anomaly that Mr. Sommer identified in the subject accident screen was the fact that the mesh did not line up properly as called for in the engineering drawings, allowing the mesh to fray and wear and allowing the migration of particulate contamination. This phenomenon led to ragged edges in the subject accident screen and gaps for particulate migration.

Mr. Sommer observed that the channel for the subject screen was .053 inches longer than the length of the screen. Mr. Sommer noted that while a baffle was present in the engineering drawings, no baffle existed inside the subject accident control. Mr. Sommer testified that the missing baffle would have been important because it would change the energy of the gas flow path in such a way as to direct particulate contamination away from the screen, and that the baffle serves the important secondary function of securing in the subject screen. Mr. Sommer testified that without the baffle, the screen was allowed to move about freely and was not contained in the channel. Mr. Sommer testified that the channel in the casting was large enough to accommodate both the screen and a baffle, although no baffle was present. Mr. Sommer testified that the channel was approximately twelve times the width of the screen.

Mr. Sommer testified at trial that it was not individual particles that held the safety valve open, but a combination of grease and sulfide particles that created a gum holding open the safety valve. Mr. Sommer testified that an exemplar sulfide particle taken from the safety valve seat measured 85 micrometers. Mr. Sommer also testified that White-Rodgers manufactured the subject accident valve with the screen, but no baffle, for a year and a half. During that time, Petitioner did nothing to give notice to

owners, consumers, or gas companies about problems associated with the screen-only valves.

Mr. Sommer testified at trial that the subject safety valve seat had a significant amount of grease that mixed with copper sulfide particulate contamination. Mr. Sommer used a scanning electron microscope and electron dispersive x-rays to determine that the particulate contamination was copper sulfide. Mr. Sommer testified that he observed a mixture of copper sulfide particles and grease on the safety valve seat, and based upon his review of the engineering drawings, grease should not be present on the safety valve seat. Mr. Sommer testified at trial that the subject particulate contamination mixed with grease and caused the safety valve to leak. Mr. Sommer also testified that the leak in the heat connection in the Bitlers' basement was caused by the concussive force of the explosion in conjunction with a bad flare fitting at that peak connection.

Mr. Sommer accounted for the fact that the subject control did not leak after the accident by noting that the subject control was altered at least twice from its pre-accident setting and condition. Mr. Sommer noted that in turning the gas control gas cock knob to the "off" position, the safety valve seats and turns. After the explosion, the gas cock knob was turned to the "off" position, and the pre-explosion condition of the safety valve seat was altered. Mr. Sommer also testified that he obtained White-Rodgers' documentation and the testimony of White-Rodgers' expert, Mr. Lambert, that copper sulfide contaminated control valves are prone to intermittent leaks.

C. W. Alan Bullerdiek

Mr. Bullerdiek has a degree in chemical engineering from Kansas State University, and has investigated fires and explosions during a professional career spanning more than twenty years. Mr. Bullerdiek ran a scientific testing laboratory that performed contract work for the United States Government, including the Federal Railroad Administration, State of New York, and Consumer Products Safety Commission. The laboratory work included performing failure modes and effects analyses of appliances. Mr. Bullerdiek was the principal investigator and principal author of the Cal Span Report admitted into evidence at trial.

Mr. Bullerdiek testified about manufacturers' duty to warn the Consumer Products Safety Commission regarding potential hazards of returned devices. Mr. Bullerdiek testified about the history of copper sulfide particulate contamination in propane appliances. Mr. Bullerdiek further testified that the Gas Appliance Manufacturers Association, as well as the Petitioner, were aware of the problems associated with copper sulfide contamination. Mr. Bullerdiek testified that there was a significant amount of particulate contamination downstream from the screen in the subject accident safety valve.

Mr. Bullerdiek testified without objection that the debris was able to circumvent the screen and that in the subject control, the channel failed to secure the screen. Mr. Bullerdiek testified that based on his education, training and experience, the amount of contamination on the subject safety valve seat was not acceptable in that the

subject safety valve seat had grease contamination and that the sticky grease captured copper sulfide particles, analogizing it to mortar and a little stone wall.

Mr. Bullerdiek testified that one of the reasons that the safety valve can cause an explosion from particulate contamination is that the safety valve seat loses its compliance, and that a result of this phenomenon is that a particle no thicker than a human hair (70 micrometers) is large enough to permit a sufficient amount of gas into the periphery of the safety valve, causing an explosion. Mr. Bullerdiek testified that the subject safety valve seat had lost a significant amount of its compliance. Mr. Bullerdiek also testified that intermittent leaking is common in safety valves which have been in explosions. The reasons for the intermittent leaking according to Mr. Bullerdiek are the disturbance of the valve during and after the explosion, the process of shutting off the safety valve, and additional disturbances. Mr. Bullerdiek testified to a reasonable degree of scientific probability that the subject gas control was defective and unreasonably dangerous.

D. William Kelner

Mr. Kelner had owned gas company and acted as a trainer and consultant in the propane gas industry. Mr. Kelner worked in the gas industry for thirty years. In 1973, Mr. Kelner assumed the position of Superintendent of Standards and Practices at the Pennsylvania Gas and Water Company.

In 1988, Mr. Kelner testified that the propane industry had meetings with control manufacturers and it was decided that sediment traps would be mandatory. Mr. Kelner also testified that copper sulfide contamination on

a safety valve seat would prevent the safety valve from closing properly. At trial, Mr. Kelner was asked by Respondents' counsel on direct examination whether he had an opinion to a reasonable degree of probability as to the cause of the gas leak in the subject explosion. The Court sustained an objection to Mr. Kelner's testifying as to causation on foundational grounds. Mr. Kelner did testify on direct that the gas control was susceptible to contamination because of lack of sediment trap. The Court later ruled that the defendants had opened the door to Mr. Kelner's testimony concerning causation.

II. ARGUMENT

A. This Court Should Not Grant Certiorari because there is no Important Issue of Federal Law at Stake; there is no Circuit Split; Petitioner's Issues of Law are Really Questions of Fact Already Properly Decided Below.

Petitioner has argued and reargued the facts of this case. The admissibility of the testimony of Respondents' Expert Testimony, their expert qualifications, and the facts which underlie their opinions, were considered by District Court Judge Nottingham in ruling on a Petitioner's motion for summary judgment. At that time Judge Nottingham considered the proffered testimony and determined that it satisfied *Daubert*,[1] *Kumho*[2] and Rule 702.[3] Respondents' experts were next challenged in

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[2] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[3] Federal Rule of Evidence 702.

pretrial motions in limine before Judge Boland,[4] who ruled the testimony was admissible. Petitioner again challenged Plaintiffs' experts at trial and again in post trial motions. At each stage of these proceedings, the trial testimony was deemed reasonable and reliable, and in conformance with *Daubert*, *Kumho* and Rule 702. Respondents' experts were next challenged by petitioner on appeal to the Court of Appeals for the Tenth Circuit, which unanimously ruled that the testimony at trial was admissible and proper. Petitioner's next challenge to Respondents' experts, their qualifications and the underlying facts occurred in the Tenth Circuit in a motion for rehearing en banc, where none of the eligible judges on the Tenth Circuit Court of Appeals called for a vote on rehearing.

1. There is no important issue of federal law at stake in this case.

This case does not involve a significant question of federal law. This Court has spoken as to the admissibility of expert witness testimony and there is no indication that the trial court abused its discretion in admitting the testimony at trial, or that the Tenth Circuit, in a unanimous decision ratified by declining en banc review, erred in finding the expert testimony admissible. The particular federal laws in question are Federal Rules of Evidence 401 and 702. (Pet., p. 1) Petitioner raises no compelling argument for any alteration by this Court of Federal Rule 401.

The remaining rule, Rule 702, was amended in December of 2000. Petitioner also makes no compelling argument for altering Federal Rule of Evidence 702. The

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[4] By agreement of the parties, the trial in the District Court was before Federal Magistrate Judge Boyd N. Boland.

courts below properly applied Rule 702. Accordingly, there is no significant issue of federal law at stake in this case.

2. No circuit split exists.

There is no split among the circuits on the issues raised in the Petition. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) grants district judges broad discretion to admit or deny expert testimony. In light of this discretion, it is possible in the federal jurisprudence to pick at nuanced differences between various cases. However, in doing so, Petitioner fails to establish a genuine split of the circuits. A genuine conflict arises when it can be said with confidence that another court of appeals or state supreme court would reach an opposite result, based on a clear ruling in a very similar case. The most compelling evidence of a conflict is an overt expression of disagreement: "We reject the rule applied in the Ninth Circuit and accordingly exclude the proffered testimony." If a conflict is less direct, consisting of disagreement over general reasoning, different outcomes in differing circumstances, or divergent dicta, the conflict is not genuine. Such is the case here. In fact, the discretion provided to federal judges by *Daubert, Kumho*, and Rule 702 has been effective in preventing circuit splits. Since particular rulings on the admissibility of expert testimony are done on a highly individualized, case-by-case basis, in order for a circuit split to arise, another circuit court would have to hold that exact or very similar proffered testimony was inadmissible. *See, e.g., Reliable Evaluation of Expert Testimony*, 116 HVLR 2142 (May 2003). Petitioner cites no similar cases where very similar testimony has been excluded. Accordingly, the Petition for Writ of Certiorari should be denied.

B. The Case Below was Properly Decided and Should not be Disturbed.

1. Petitioner has argued precisely Respondents' theory of contamination in prior cases.

What Petitioner now claims to be "junk science" before this Court, it has argued as a scientific reality when its own purposes are best served. In *Tousigant v. Sears* and employee of Emerson Electric employees stated:

> Our tests indicate no leakage past the safety valve or thermostatic valve. There is copper sulfide in the control. We can only assume that the control leaked past the safety valve at one time due to the copper sulfide, as we can determine no other assignable cause . . .

(Aplee. Supp. App. at 13) In the case of *Maertens v. White-Rodgers*, Petitioner's own expert Rudolph Lambert examined a gas control and wrote in his report:

> The black foreign material noted on the inlet of the control and on the rubber surface of the safety valve has the appearance of copper sulfide. Copper sulfide is formed in copper gas lines by a reaction between copper and sulphur compounds in the gas. *While the safety valve did not leak when I tested it, the foreign material noted on the rubber surface of the safety valve and in the inlet of the thermostat, could have caused it to leak at one time, and caused a substantial discharge of unburned fuel if the water heater pilot became extinguished.* (Emphasis added)

(Aplee. Supp. App. at 14)

Despite the fact that when the valve was tested by Mr. Lambert a few minutes before he opened the control and it did not leak, Mr. Lambert concluded that copper sulfides were a probable cause of the leak which led to the *Maertens's* explosion.

a. Petitioner misstates the *Daubert* requirements.

No attempt has been made to "codify" the specific *Daubert* factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumho*, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997).

Under *Daubert*, expert opinions must be based on facts that enable the expert to express a reasonably accurate conclusion, as opposed to conjecture or speculation. Absolute certainty is not required. Fed.Rules Evid.Rule 702, *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003) In the instant case, each expert opinion admitted at trial was proffered by an individual whose credentials were not challenged on appeal. The opinions were based upon skills, training and experience and applied in a reasonable fashion to the facts of this case. *Daubert* requires nothing more.

The Tenth Circuit Court of Appeals held that Mr. Boh's examination of the scene and determination of the

likely cause of the explosion was not susceptible to testing or peer review. Notwithstanding, the Court held that based upon Mr. Boh's personal experience, training, method of observation, and deductive reasoning, it was sufficiently reliable to constitute a scientifically valid methodology. (Pet. App. 12a) With respect to Mr. Sommer, the Tenth Circuit started its analysis by examining the purposes for testing in *Daubert*. The Court determined that testing is necessary when an expert advances a theory that runs contrary to establish scientific principles, such as Copernicus' Falsification of Ptolomy's Theory of Movement of Celestial Bodies, (Pet. App. 13a) or in a recent Tenth Circuit example, the theory that wood could ignite at much lower temperatures than previously thought. *Truck Ins. Exch. v. MagneTek Inc.*, 360 F.3d 1206, 1211-1212 (10th Cir. 2004). In attempting to disprove established knowledge about regularly occurring phenomenon, testing is exceedingly important. However, in cases such as this, where experts rely upon experience in investigating fires, as well as established principles of mathematics, engineering, and physics, and the established principle that copper sulfide causes propane gas leaks, such testing is not required. (Pet. App. 13a).

That small particles of copper sulfide can combine with grease on the safety valve seat of a propane gas control and cause a leak and subsequent explosion, enjoys general acceptance in the scientific community. The Tenth Circuit noted Petitioner's misunderstanding of the important issue at stake in this case. Whether the particles and grease found on the safety valve seat caused the subject accident is a matter of the sufficiency of Respondents' evidence; i.e., whether the jury was convinced that Respondents' theory of causation was probable in this case.

This is a completely separate inquiry from whether the underlying theory is scientifically reliable. (Pet. App. 14a) Petitioner's confusion on these issues appears to be continuing, despite the Tenth Circuit's clarification. As that Court noted, the dispute as to whether copper sulfide and grease contamination on the safety valve seat caused the leak was properly a fact question for the jury. As the Tenth Circuit correctly noted, the experts' testimony fits the facts of this case and assists the jury in resolving a factual dispute. (Pet. App. 19a) Accordingly, the District Court performed its gate-keeping function by making a preliminary assessment of whether the reasoning or methodology underlying the testimony was scientifically valid and whether it could properly be applied to the facts at issue. (Pet. App. 19a) *Daubert* and its progeny require nothing more.

b. *Daubert* encourages Respondents' experts' methodology.

Respondents' expert testimony at trial satisfies *Daubert* and *Kumho*. *Kumho* did not restrict the ability of experts to testify, but rather re-stated the proposition that such testimony must be reliable and relevant. The court held that where "such testimony's factual basis, data, principles, methods, or their application are called *sufficiently* into question, . . . the trial judge must determine whether the testimony has 'a reliable basis in knowledge and experience of the [relevant] discipline.'" 119 S.Ct. at 1175 (quoting *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786)

In addressing the issue of whether a trial court has the authority to consider the *Daubert* factors in determining the admissibility of a tire expert (i.e., engineer's)

testimony, the court "[e]mphasiz[ed] the word 'may.'" *Id.* at 1175. "Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in *some* cases. . . . In other cases, the relevant reliability concerns may focus upon personal knowledge or experience." "[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Id.* at 1178. The Court cited with approval the Petitioners' contention that "*Daubert* was intended neither to be exhaustive nor to apply in every case." *Id.* at 1179. As explained by the Court:

> Our emphasis on the word "may" thus reflects *Daubert*'s description of the Rule 702 inquiry as "a flexible one." 509 U.S. at 594, 113 S.Ct. 2786. *Daubert* makes clear that the factors it mentions do *not* constitute a "definitive checklist or test." *Id.* at 593, 113 S.Ct. 2786. And *Daubert* adds that the gatekeeping inquiry must be "'tied to the facts'" of a particular "case." (Citations omitted) We agree . . . that "[t]he factors identified in *Daubert may or may not* be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." . . . Too much depends upon the particular circumstances of the particular case at issue. *Id.* at 1175.

Petitioner also contends that Courts disfavor "differential diagnosis." In fact, courts have held that whether the expert has adequately accounted for obvious alternative explanations is an important part of determining whether such opinions are reliable. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the Respondent's condition). *Compare Ambrosini v.*

Labarraque, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

III. CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

WHITE-RODGERS,
A DIVISION OF EMERSON ELECTRIC COMPANY,
Petitioner,

v.

FRED D. BITLER, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 04-1485

WHITE-RODGERS,
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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the American Tort Reform Association and National Association of Manufacturers request leave to file the accompanying brief as *amici curiae* in support of the Petition for a Writ of Certiorari. While the Petitioner has consented to the filing of this brief, Respondents' counsel have withheld consent, necessitating the filing of this

motion.[1]

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed important liability issues.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

This case is of interest to *amici* because it provides a sound vehicle for this Court to address three key areas of division in the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). If the Tenth Circuit's ruling is allowed to stand, and other courts follow in this direction, then *Daubert* will be drained of its principal public policy purpose: to help assure that the trier of fact determines the truth in cases involving expert testimony. While some courts have adhered closely to *Daubert*'s

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[1] Petitioner's letter of consent has been lodged with the Clerk of the Court.

principles, others, such as the Tenth Circuit, have adopted an interpretation that (1) disregards the reliability of conclusions that do not flow from the facts of the case or the expert's analysis; (2) applies the minimal relevancy requirement favoring admission of ordinary evidence, rather than the heightened requirement that expert testimony "fit" the specific case; and (3) renders testing of scientific or technical theories wholly optional, even when such verification is readily available. The combination of the "wrong turn" on all three issues, which occurred in this case, substantially undermines *Daubert*'s gatekeeping process and truth-finding purpose.

Amici participated as *amici curiae* in both *Daubert* and *Kumho Tire* and have a strong interest in ensuring that the Court's rulings in those cases are not eviscerated.

For the foregoing reasons, the proposed *amici* are well-suited to bring these matters to the Court's attention. Accordingly, the American Tort Reform Association and National Association of Manufacturers respectfully request that the Court grant its motion for leave to file the attached brief.

Respectfully submitted,

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Dated: June 9, 2005

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BRIEF OF *AMICI CURIAE* AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 busi-

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[1] This motion for leave to file this brief *amici curiae* is filed simultaneously with the brief. No counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

nesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

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This case is of interest to *amici* because it provides a sound vehicle for this Court to address a unique combination of three key areas of division in the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. If the Tenth Circuit's ruling is allowed to stand, and other courts follow in this clear direction 180 degrees away from *Daubert*, then the decision will be drained of its principal public policy purpose: to help assure that the trier of fact determines the truth in cases involving expert testimony.

Amici participated as *amici curiae* in both *Daubert* and *Kumho Tire* and have a strong interest in ensuring that the Court's rulings in those cases and subsequent ones are not eviscerated.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioner's statement.of the